Gary L. Phillips
General Attorney &
Assistant General Counsel

SBC Services, Inc.
1401 Eye Street, NW,
Suite 400
Washington, D.C. 20005
Phone: 202-326-8910
Fax: 202-408-8731

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Jeffery J. Carlisle, Esq.
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: ***Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers*, CC Docket No. 01-338**

Dear Mr. Carlisle:

I am writing in response to the efforts of certain CLECs to delay implementation of the *Triennial Review Remand Order* ("*TRRO*").[1] The *TRRO* put in place a "nationwide bar" on unbundled switching and hence the UNE-P, and it also exempted from unbundling high-capacity loops and transport in wire centers meeting certain criteria. Importantly, in connection with those rulings, the Commission set forth transition plans that, as of the effective date of the order, "do[] not permit competitive LECs to add new" switching or high-capacity network elements "in the absence of impairment." *TRRO* ¶ 5; *see id.* ¶¶ 142, 195, 227. Nevertheless, consistent with the views set out in letters filed with the Commission last week,[2] certain CLECs have taken the position that, after the effective date of the *TRRO*, they are entitled to continue placing new orders for switching and loops and transport despite the absence of impairment, and they are petitioning state commissions on an "emergency" basis to prevent SBC and other ILECs from implementing the *TRRO* according to its terms.[3] In doing so, moreover, these CLECs have made clear that, in their view, the implementation of the *TRRO*'s elimination of UNEs will be a drawn-out affair, requiring extensive negotiation and arbitration over issues including (but not limited to) section 271 unbundling, state law network access requirements, long-expired merger

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[1] Order on Remand, *In re Unbundled Access to Network Elements*, FCC 04-290, WC Docket No. 04-313, CC Docket No. 01-338 (Feb. 4, 2005).

[2] *See* Letter from Jason D. Oxman, ALTS, to Jeffrey Carlisle, Chief, Wireline Competition Bureau, WC Docket No. 04-313 (FCC filed Feb. 22, 2005) ("ALTS Letter"); Letter from Russell M. Blau *et al.*, Swidler Berlin LLP, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313 & CC Docket Nos. 01-338 *et al.* (FCC filed Feb. 23, 2005).

[3] *See, e.g.*, *infra* n.7.

conditions, and batch hot cut processes. The CLECs, in short, are doing all that they can to ensure delay. The Commission should promptly clarify that the *TRRO* means what it says, and that CLECs accordingly may not order new network elements in the absence of impairment as of the effective date of the *TRRO*.

A. The *TRRO* Forecloses New Adds In the Absence of Impairment as of the Effective Date of the Order

1. The *TRRO* marks the latest chapter in the Commission's long-running effort to "determin[e] what network elements should be made available for purposes of [section 251(c)(3)]." 47 U.S.C. § 251(d)(2). In *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), the D.C. Circuit vacated the Commission's prior rules, holding (i) that the Commission had improperly delegated to the states the question of whether to unbundle mass-market switching and high-capacity loops and transport, and (ii) that its provisional findings of impairment as to those elements were unlawful. *See id.* at 565-66, 570-71, 574-75. On remand, the Commission found that CLECs "are not impaired" without access to unbundled switching for mass-market customers, and it further acknowledged "that the continued availability" of the UNE-P "would impose significant costs in the form of decreased investment incentives." *TRRO* ¶¶ 204, 210. The Commission thus imposed a "nationwide bar" on the UNE-P. *Id.* ¶ 204. Likewise, the Commission foreclosed unbundling of high-capacity loops and transport in wire centers meeting certain criteria, reasoning that "competitive . . . facilities have been or can be deployed" in those centers and that unbundling would accordingly diminish incentives for facilities-based competition. *E.g.*, *id.* ¶¶ 130, 174.

For present purposes, no one disputes the scope of unbundling relief that the Commission granted in the *TRRO*. There is dispute, however, over the transition plans the Commission put in place. With respect to UNE-P, the *TRRO* gives CLECs twelve months to "submit orders to convert their mass market customers to an alternative service arrangement." *Id.* ¶ 227. The Commission reasoned that "the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversions." *Id.* To facilitate negotiation of those follow-on arrangements, the FCC gave the parties twelve months "to modify their interconnection agreements, including completing any change of law processes." *Id.* And the FCC ruled that incumbent LECs would be entitled to receive additional compensation (one dollar over the applicable UNE-P rate) for the "embedded base" of UNE-P lines – *i.e.*, UNE-P lines in service as of the effective date of the order. *Id.* ¶ 228; *see* 47 C.F.R. § 51.319(d)(2)(iii). "UNE-P arrangements no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable change of law processes." *TRRO* ¶ 228 n.630.

Critically, however, the Commission made clear that the transition period applies *only* to the embedded base. *See id.* ¶ 227. CLECs are not permitted to add any *new* UNE-P arrangements after the effective date of the *TRRO*. As the Commission repeatedly stated, the transition plan "does not permit competitive LECs to add new UNE-P arrangements using

transition plan "does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3)." *Id.*; *see also id.* ¶ 5 ("This transition plan applies only to the embedded base, and does not permit competitive LECs to add new switching UNEs."); 47 C.F.R. § 51.319(d)(2)(iii) ("Requesting carriers may not obtain new local switching as an unbundled network element.").

The transition plans for high-capacity loops and transport follow the same general pattern. The Commission gave CLECs 12 months "to transition to alternative facilities or arrangements" and carriers must make any necessary modifications to their interconnection agreements within those 12 months. *TRRO* ¶¶ 143, 196.[4] During that transition period "any high-capacity [facilities] that a CLEC leases as of the effective date of this Order, but for which the Commission determines that no section 251(c)(3) unbundling requirement exists, shall be available at" 115% of the otherwise applicable rate. *Id.* ¶¶ 145, 198. As with UNE-P arrangements, all such facilities "shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable change of law processes." *Id.* ¶ 145 n.408, ¶ 198 n.524. And, also as with UNE-P arrangements, the Commission's transition plan "do[es] not permit competitive LECs to add new [high-cap loops or transport] pursuant to section 251(c)(3) where the Commission has determined that no section 251(c)(3) requirement exists." *Id.* ¶ 195 (loops); *see also id.* ¶ 142 (transport); *id.* ¶ 5; 47 C.F.R. § 51.319(a)(4)(iii), (a)5)(iii), (a)(6)(iii), (e)(2)(ii)(C), (e)(2)(iii)(C), (e)(2)(iv)(C).

These transition plans – and, in particular, the fact that CLECs are "not permit[ted]" to order new elements where there is no impairment – are entirely sensible. The CLECs' existing base of UNE-P lines – and the high-capacity loop and transport UNEs they are using in wire centers where there is no impairment – were obtained pursuant to *unlawful* unbundling rules. The *TRRO* requires CLECs to make alternative arrangements to serve those existing customers within 12 months of the effective date of the order. It would complicate that transitional effort and undermine attempts to reach commercial agreements if CLECs were permitted to add *new* facilities after the *TRRO*'s effective date. Equally important, in the *Interim Order*[5] that the Commission issued in the wake of *USTA II*, the Commission overrode existing interconnection agreements to freeze the status quo in place, and thereby prevented ILECs from implementing their rights to excise the unlawful unbundling rules from those agreements. Having prevented the ILECs from completing the change-of-law process in the past, the Commission obviously could not – and did not purport to – force them to pursue that same process here, with all of the attendant uncertainty and delay, before ceasing provisioning of new network elements in the absence of impairment.

The Commission's order is accordingly clear. Carriers must negotiate and arbitrate through the section 252 process the Commission's affirmative unbundling obligations.

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[4] The transition period for dark fiber facilities is 18 months, rather than 12 months. *See TRRO* ¶¶ 142, 195.

[5] Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements*, FCC 04-179, WC Docket No. 04-313 (rel. Aug. 20, 2004).

Likewise, ILECs are not entitled to collect the mandatory increase in rates for the "embedded base" – *i.e.*, customers who were obtained under existing interconnection agreements and whose terms of service are accordingly dictated by those agreements – until the agreements in question are amended. But CLECs are not permitted to rely on those same agreements – which were put in place in order to codify unlawful rules, and which were held in place pursuant to a Commission directive that overrode their terms – in order to obtain *additional* network elements absent impairment. Rather, the Commission's "transition plan applies only to the embedded base, and does not permit competitive LECs to add" new elements in the absence of impairment. *TRRO* ¶ 5.

2. Notwithstanding the clarity of the Commission's order on these points, certain CLECs contend – in filings with this Commission, as well as in petitions before state commissions throughout the country – that the Commission's transition plans *do* permit them to continue adding new elements, even where the Commission has found that they are not impaired without access to the elements in question. But the CLECs have identified nothing in the order to support their reading. The key paragraph on which they rely applies only to the Commission's "[u]nbundling [d]eterminations" – that is, to the Commission's rules imposing unbundling requirements pursuant to section 251(c)(3). *Id.* ¶ 233. That paragraph does not mention the Commission's transition rules for the embedded base or the prohibition on new adds. And for good reason. The transition rules and prohibition are not *unbundling* requirements – that is, they do not implement section 251(c)(3). Rather, they transition carriers away from certain elements specifically because the Commission has concluded that those elements should *not* be unbundled pursuant to section 251(c)(3).[6] Paragraph 233 accordingly does not undercut the Commission's ruling that its 12 month transition plans "do[] not permit competitive LECs to add new" elements in the absences of impairment.

The CLECs also make much of paragraph 227 of the order, which, while setting out its general rule – *i.e.*, that "[the] transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new switching UNE-P arrangements" – includes a caveat: "except as otherwise specified in this Order." *Id.* ¶ 227. In the CLECs' view, that caveat refers to paragraph 233, which, again, provides that carriers must implement the Commission's unbundling determinations pursuant to the section 252 process. But the CLECs ignore the fact that, in the very next paragraph, the Commission explains that "the transition mechanism" it has adopted "is simply a default process" that can be superseded by voluntarily negotiated "alternative arrangements . . . for the continued provision of UNE-P." *Id.* ¶ 228. In other words, the caveat on which the CLECs place so much weight merely confirms that, where the parties reach agreement on an "alternative arrangement[] superseding th[e] transition period," and where

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[6] It is presumably because paragraph 233 applies only to the unbundling requirements established in the *TRRO* and not to the no new adds rule that the Commission expressly provided elsewhere in the *TRRO* that the terms of the twelve-month transition plans for switching, loops, and transport should be incorporated into carriers' interconnection agreements. *E.g.*, *TRRO* ¶ 228 n.630. As noted, however, the Commission made no such provision for the prohibition for new adds. The argument that the *TRRO* requires the no new adds rule to be incorporated into agreements is thus flatly wrong.

that alternative arrangement provides for continued access to UNE-P at a mutually agreeable rate, they are entitled to adhere to the terms of that agreement. Indeed, if the CLECs were correct that the paragraph 227 caveat had the importance they attach to it, presumably the Commission would have included it not only in its discussion of mass-market switching and the UNE-P, but also in its transition plans regarding high-capacity loops and transport. After all, in the CLECs' view, *all* requirements of the *TRRO* must be implemented pursuant to section 252. The Commission, however, included that phrase only in its discussion of UNE-P. The caveat on which the CLECs rely therefore cannot bear the weight put upon it. And, as a result, paragraph 227 must be read to mean what it says: the "transition period . . . does not permit competitive LECs to add new UNE-P arrangements," except to the extent a CLEC reaches agreement on an "alternative arrangement[] superseding th[e] transition period." *Id.* ¶¶ 227-228.

Nor, finally, can there be any serious argument about the *authority* of the Commission to halt new adds as of the effective date of the Order, irrespective of the terms of any interconnection agreement. "An agency, like a court, can undo what is wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965). That is precisely what the Commission has done here. The interconnection agreements on which the CLECs place so much reliance are a direct result of the Commission's failure to implement the 1996 Act in a manner consistent with the will of Congress and binding judicial decrees. As a result, ILECs have lost millions of customers and incalculable revenues. The notion that the Commission is foreclosed from redressing that situation – and that, instead, it must sit idly by while CLECs continue to make use of judicially invalidated unbundling edicts that the Commission itself has recognized "impose significant costs in the form of decreased investment incentives," *TRRO* ¶ 210 – is obviously incorrect.

3. While the CLECs are thus wrong as a matter of law when they claim that they may continue adding new UNE-P lines unless and until their interconnection agreements are revised to incorporate the *TRRO*'s no new adds rule, they are also wrong as a matter of policy. Indeed, it is critical that the Commission understand the consequences of accepting the CLECs' cynical claims. As the CLECs see it, implementation of the no new adds rule is not a straightforward matter, much less the purely ministerial task that it should be. Indeed, in their view, the no new adds rule is not even binding law. Weeks ago, SBC made available a contract amendment that included proposed language to implement the Commission's unbundled mass market switching transition rules in a straightforward, unobjectionable manner. *See* Attachment A. The CLECs, however, have refused to sign it, and are instead insisting that negotiations (and even arbitrations) must cover not just the *TRRO*, but myriad issues, including, among others, (1) "SBC's [purported] duty to continue to provide UNE-P to . . . CLECs at current rates under state law;" (2) SBC's alleged duty to continue such access, also at "current rates," "under § 271 of the Federal Act;" (3) "[t]he *exact* process which must be used by SBC for batch hot cuts, and the corresponding rates"; and (4) SBC's alleged duties under SBC/Ameritech merger conditions that expired long ago.[7] Thus, if the CLECs have their way with respect to the no new adds rule, they will frustrate the Commission's objective of a prompt transition to lawful rules.

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[7] Joint Motion by MCI, Inc., *et al.*, For Emergency Order Preserving Status Quo for UNE-P Orders, R. 95-04-003, I. 95-04-044, ¶¶ 17, 21, 45 (Cal. PUC filed Mar. 1, 2005)

It is for precisely this reason that the Commission must take immediate action to shut down these CLEC claims. As of this writing, CLECs have asked state commissions to block SBC's implementation of the *TRRO* in California, Connecticut, Kansas, Indiana, Michigan, and Missouri, and they are expected to seek similar relief in other states shortly. CLECs have also made this same request in numerous states in other BOC regions, including (at least) Alabama, Georgia, Kentucky, New Jersey, New York, Maryland, Pennsylvania, South Carolina, and Maine. It is inevitable that at least some of these states, which have ardently supported the UNE-P and insisted that they have independent authority to perpetuate it, will be sympathetic to the CLEC claims – indeed, the Georgia commission has already adopted a staff recommendation to that effect.[8] The Commission has previously stressed the importance of "a speedy transition in the event [it] ultimately decline[s] to unbundle switching, enterprise market loops, or dedicated transport." *Interim Order* ¶ 22. The Commission now has made that determination. It should not sit by while the CLECs make a mockery of that decision and continue to use a vehicle that the Commission has expressly found "impose[s] significant costs" on the industry. *TRRO* ¶ 199.[9]

4. At the same time that it clarifies that the *TRRO*'s no new adds rule means what it says, the Commission should also clarify that it applies (as it says) to all new "UNE-P arrangements," not just to new "customers." Along with their contention that the Commission intended to permit UNE-P new adds indefinitely, the CLECs are also contending – and one state commission appears to have ruled on an interim basis[10] – that, even where the new add

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(Attachment B hereto); Joint Motion for Emergency Order Preserving Status Quo for UNE-P Orders, Cause No. 42749, ¶ 34 (Ind. U.R.C. filed Feb. 25, 2005) (Attachment C hereto).

[8] *See Consideration of Staff's Recommendation regarding MCI's Motion for Emergency Relief Concerning UNE-P Orders*, at 4, Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements, Docket No. 19341-U (Georgia P.S.C. Mar. 1, 2005). The Georgia staff analysis is based on a misunderstanding of the authority of the Commission to implement judicial reversals. In addition, it ignores the portions of the *TRRO* – in particular, paragraphs 5 and 227 – that make clear that the transition plans do not permit CLECs to add new UNE-P arrangements.

[9] At a minimum, if the Commission determines that, contrary to the language of the *TRRO*, the transition period it put in place does allow the addition of new UNE-P adds until carriers amend their interconnection agreements, the Commission should require carriers to amend their agreements prior to the effective date of the order (March 11, 2005). As noted in the text, SBC has given CLECs every opportunity to do so, by making available a ministerial amendment, for those carriers that believe one is necessary, that implements the no new adds rule. The Commission should further hold that failure to sign this amendment (or one that is materially identical to it) is a presumptive breach of the obligation to negotiate in good faith that warrants rejection of UNE-P orders beginning March 11.

[10] Order No. 39 Issuing Interim Agreement Amendment, *Arbitration of Non-Costing Issues For Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No.

prohibition applies, it only prevents CLECs from adding new *customers*, while allowing them to add new *lines* for existing customers.

That reading makes no sense. The language the Commission used could not be more clear. The transition period "does not permit competitive LECs to add new UNE-P *arrangements* using unbundled access to local circuit switching pursuant to section 251(c)(3)." *Id.* (emphasis added); *see id.* ¶ 5 ("This transition plan applies only to the embedded base, and does not permit competitive LECs to add new switching UNEs."). Where a CLEC orders a new UNE-P line to an existing customer, it is in fact ordering a new switch port, combined with a UNE loop and shared transport. Under the plain terms of the *TRRO*, such a "UNE-P arrangement" cannot be ordered after March 11. This interpretation is mandated not only by the language of paragraph 227, but also by the language of the FCC's implementing regulation, which flatly states that "[r]equesting carriers may not obtain new local switching as an unbundled network element." 47 C.F.R. § 51.319(d)(2)(iii).

This interpretation is also mandated by common sense. Again, the point of the transition period is to force CLECs to transition their embedded base of UNE-P customers – customers that were obtained pursuant to rules that were vacated three separate times – to alternative serving arrangements. It makes no sense to conclude that, even as CLECs are required to transition their *embedded* base of customers, they are permitted to order brand new lines to serve the same customers, using the same discredited rules. Indeed, such a ruling would create enormous opportunities for abuse. Rather than transitioning their existing customers to alternative arrangements, unscrupulous CLECs could simply attempt to disconnect existing lines and then order new ones to replace them, thus defeating the central purpose of the transition period. Although such conduct is transparently unlawful under any reading of the *TRRO*, the fact that the CLECs' favored interpretation raises the potential for such abuse is another reason, if any were necessary, to reject it.

B. SBC's Implementation of the High-Capacity Loop and Transport Carve-Outs Is Consistent With the Order

Apart from its incorrect understanding of the *TRRO*'s transition rules, ALTS disputes SBC's plans for implementing the Commission's rules for determining which wire centers meet the criteria for limiting or eliminating unbundling of high-capacity loops and transport. As ALTS sees it, ILECs must negotiate and arbitrate before state commissions the specific list of wire centers or routes where high-capacity facilities are not required to be provided as UNEs.

ALTS's claim in this respect centers on paragraph 234 of the order, which permits a CLEC to "self-certify" that, based on a "reasonably diligent inquiry," it is entitled to obtain a particular high-capacity loop or transport UNE. *TRRO* ¶ 234. But this self-certification process does not permit CLECs simply to decree where unbundling is mandated in the first place. Any such reading would be absurd. CLECs do not have access to the information necessary to

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28821 (Tex. P.U.C. Feb. 25, 2005). The Texas commission's ruling applies until July 31, 2005, not for the duration of the Commission's transition period.

determine where the criteria outlined in the *TRRO* are met. Thus, at this point, before the CLECs know or the Commission has ruled where the criteria are satisfied, any self-certification process would be pure guesswork, something the Commission plainly did not intend.

In any event, to the extent ALTS grounds its objections to SBC's planned implementation of the *TRRO* in the supposed lack of detail surrounding SBC's list of wire centers that meet the Commission's criteria, that concern has no basis. SBC has now filed with the Commission, under seal, the data supporting its determinations of which wire centers fall within the Commission's criteria. That data can now be reviewed by CLEC counsel, subject to protective order. If any CLEC has a legitimate dispute about the wire center information that SBC submitted in response to the Wireline Competition Bureau's request, the time to present that dispute to the Commission is now, before the March 11, 2005 effective date of the *TRRO*. Even if ALTS is correct about the meaning of paragraph 234, where a CLEC fails to do so, it cannot contend that it has taken a "reasonably diligent inquiry" that would permit it to "self-certify" that it is entitled to high-capacity facilities in wire centers that SBC has identified as meeting the Commission's criteria.

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Although SBC plainly disputes the CLECs' tortured reading of the *TRRO* on the points discussed above, we agree with ALTS on one core point: "inaction is not an option."[11] Absent Commission guidance on these issues, ILECs, CLECs, and state commissions throughout the country will be locked in protracted, costly litigation in federal courts throughout the country. And the Commission, for all its talk about putting in place sound, uniform rules that can withstand judicial review and create certainty in the industry, will have left the implementation of those rules to scores of federal district courts, with the likelihood of inconsistent judgments to follow. The industry has endured enough unbundling litigation. The Commission can and should act quickly to avoid the coming onslaught.

Yours truly,

/s/Gary L. Phillips

cc: Ms. Carey
Mr. Navin
Mr. Schlick

[11] ALTS Letter at 2 n.5.